

TTAB

Serial No.: 78/524,961
Law Office: 114
Examiner: David H. Stine
Attorney Docket No.: A0017/2033

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

APPLICANT: Annie's Homegrown, Inc.
SERIAL NO.: 78/524,961
FILED: December 1, 2004
MARK: FRUIT BUNNIES
EXAMINER: David H. Stine
LAW OFFICE: 114

COMMISSIONER FOR TRADEMARKS
P.O. Box 1451
ALEXANDRIA, VA 22313-1451

FORWARDING APPLICANT'S REPLY BRIEF TO EXAMINER STINE

Sir:

Enclosed please find a copy of Applicant's Reply Brief filed at the United State Patent and Trademark Office Trademark Trial and Appeal Board on February 23, 2007. Because this Appeal is an ex-parte appeal, Applicant respectfully asks the Commissioner to forward this Reply Brief to Examiner David H. Stine in Law Office 114.

Respectfully submitted,



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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

APPLICANT:	Annie's Homegrown, Inc.
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APPLICANT'S REPLY BRIEF

This Reply Brief, submitted on February 23, 2007, is in response to the Examining Attorney's Appeal Brief dated January 3, 2007.

I. The Mark "FRUIT BUNNIES" Is at Best Suggestive and Is Registrable

It is respectfully submitted that the term FRUIT BUNNIES used in connection with Applicant's goods is not "merely" descriptive, but is at best suggestive, since it requires imagination, thought and perception to reach a conclusion as to the nature of the goods, which in this case is "dehydrated fruit snacks." Such suggestive marks are deemed inherently distinctive and are entitled to registration, and any doubts concerning the issue of descriptiveness should be resolved in favor of the Applicant. *See In re Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 828 F.2d 1567, 1571 (Fed. Cir. 1987); *In re Conductive Sys., Inc.*, 220 U.S.P.Q. 84, 86 (T.T.A.B. 1983).

In his Appeal Brief, the Examining Attorney argues that under Lanham Act § 2(e)(1), 15 U.S.C. § 1052(e)(1), the mark FRUIT BUNNIES is descriptive when used in connection with Applicant's goods. The refusal of registration apparently is based on the assumption that the term "FRUIT BUNNIES" "aptly describes salient characteristics of the applicant's goods, namely that they are fruit snacks in the shape of bunnies." Examiner's Brf. at 2. However, the Examining Attorney's argument is flawed because a unique juxtaposition of terms is not properly considered merely descriptive, as described below.

“Combinations of merely descriptive components have been found registrable if the juxtaposition of the words is inventive or evokes a unique commercial impression, or if the term has a bizarre or incongruous meaning as applied to the goods.” T.M.E.P. § 1209.01(b); *see also In re Colonial Stores Inc.*, 394 F.2d 549, 157 U.S.P.Q. 382 (C.C.P.A. 1968) (SUGAR & SPICE held not merely descriptive of bakery products); *In re TBG Inc.*, 229 U.S.P.Q. 759 (T.T.A.B. 1986) (SHOWROOM ONLINE held not merely descriptive of computerized interior furnishings product information service); *In re Shutts*, 217 U.S.P.Q. 363 (T.T.A.B. 1983) (SNO-RAKE held not merely descriptive of a snow removal hand tool). “The issue is whether the mark considered in its entirety possesses a merely descriptive significance as applied to the goods in question, i.e., whether it conveys a readily understood meaning to the average purchaser of such goods.” *See In re Bright-Crest, Ltd.*, 204 U.S.P.Q. 591 (T.T.A.B. 1979).

As described with further support below, Applicant’s mark has no definitive meaning or significance other than as a trademark to identify Applicant’s goods, and is not, therefore, descriptive thereof. In particular, Applicant’s mark does not “convey[] a readily understood meaning to the average purchaser of such goods,” but instead at best *suggests* the nature of Applicant’s goods. *Id.*

A. The Term FRUIT BUNNIES Has Multiple Connotations and Is Not Merely Descriptive of The Goods to Which It Is Applied

The Examining Attorney’s conclusion that FRUIT BUNNIES is merely descriptive of Applicant’s goods is based on the dictionary term for “bunnies” and on Applicant’s acknowledgment that the dehydrated fruit snacks would come in the shape of a bunny. Examiner’s Brf. at 2. The Examining Attorney has correctly determined that the term “BUNNIES” is “a rabbit, especially a young one.” However, the Examining Attorney cannot stop there and erroneously conclude that FRUIT BUNNIES merely describes Applicant’s goods, namely dehydrated fruit snacks, because Applicant is not selling bunnies nor is Applicant selling fruit as defined by the definition that is part of this record. The Examining Attorney must go further and also consider colloquial use of the term “BUNNIES.”

The term “BUNNIES,” as used and recognized by the consumer, has also come to mean “a term of endearment as applied to women and children.” OXFORD ENGLISH DICTIONARY 659

(2d ed.1989). Given the multiple definitions ascribed to the term "BUNNIES," the Examining Attorney cannot single out one definition to define "BUNNIES" and exclude other popular and accepted meanings of the term. Further, the term "BUNNIES" conjures meanings beyond its definition, namely images of youth and spring. The fact that Applicant's mark contains the term "BUNNIES," combined with the term "FRUIT" (which also has multiple meanings), renders Applicant's mark a highly suggestive mark.¹ The term "FRUIT," as consumers understand it, refers to fresh produce from plants, and often the term recalls fresh, colorful and healthy images. Even if consumers were to ascribe some meaning to the mark, such as healthy, colorful, flavorful, fun/playful and easy to eat (soft) snacks, which could invoke images of the "kid" in consumers, the suggestive connotation of the mark as a whole has no definitive meaning or significance other than as a trademark.

It is well recognized that a combination of descriptive words can result in a protectable trademark that is *suggestive* of the goods. See *In re Calspan Technology Prods., Inc.*, 197 U.S.P.Q. 647, 649 (T.T.A.B. 1977) (including cases cited for this principle therein). The descriptive components in a unitary term can create a suggestive connotation, with no definitive meaning. See *id.*; see also *In re Sweet Victory, Inc.*, 228 U.S.P.Q. 959, 960-61 (T.T.A.B. 1986); *In re Uniroyal, Inc.*, 215 U.S.P.Q. 716, 718 (T.T.A.B. 1982). Here, the terms "FRUIT" and "BUNNIES," when encountered in combination, creates a distinctive mark without any real definition.

No matter what interpretation is applied, the "FRUIT BUNNIES" mark does not describe Applicant's goods specifically. As further discussed below, the mental steps necessary to identify the goods from the mark demonstrates its suggestive nature.

B. FRUIT BUNNIES Requires Consumer Imagination to Reach a Conclusion as to the Nature of the Goods to Which It Is Applied

According to the imagination test, a term is descriptive if it forthwith conveys an immediate idea of the ingredients, qualities, or characteristics of the goods, but is only suggestive

¹ Fruit is defined as (1) the ripened ovary or ovaries of a seed-bearing plant; an edible usually sweet and fleshy form of a plant; (2) crop or product; (3) progeny or offspring; (4) a

if it requires imagination, thought, and perception to reach a conclusion as to the nature of the services. *Stix Prods., Inc. v. United Merchants & Mfrs. Inc.*, 295 F. Supp. 479, 488, 160 U.S.P.Q. 777 (S.D.N.Y. 1968). If one must exercise “mature thought or follow a multi-stage reasoning process” to determine the nature of the goods or services, then the mark is suggestive and not descriptive. *In re Tennis in the Round, Inc.*, 199 U.S.P.Q. 496, 498 (T.T.A.B. 1978). If the mental leap between the word and the goods’ and services’ attributes is not virtually automatic and instantaneous, this strongly indicates suggestiveness. J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* §11.21[1] (4th ed. 2006). Furthermore, where an otherwise descriptive term is so broad as to encompass a universe of potential goods and services, such a mark is suggestive and not descriptive of the particular goods offered by the Applicant. *In re Hutchinson Technology, Inc.*, 852 F.2d 552, 554, 7 U.S.P.Q.2d 1490, 1492 (Fed. Cir. 1988); *In re Application of the House Store, Ltd.*, 221 U.S.P.Q. 92, 93 (T.T.A.B. 1983).

In the present case, the connection between “FRUIT BUNNIES” and Applicant’s goods is not at all instantaneous. McCarthy §11.21[1]. The term “FRUIT BUNNIES” is not descriptive of Applicant’s goods, but rather it is meant to suggest or connote a relationship to healthy, fun, flavorful and colorful snacks which appeals to the consumer’s youthful and endearing nature. Specifically, Applicant is famous for providing healthy, tasty and organic goods to consumers throughout the country. Applicant’s brands include the Bunny Seal of Approval, Reg. Nos. 1,874,043; 2,453,202; 3,020,937; 3,086,073; and Registration No. 3,078,454 for CHEDDAR BUNNIES and Registration No. 3,184,774 for BUNNY GRAHAMS; and allowed Application Serial No.78/524,954 for BUNNIES. Coupling Applicant’s reputation and registrations with the suggestiveness of the mark “FRUIT BUNNIES” provides the consumer with subtle connections between Applicant’s goods and the mark, such that the consumer must make several mental leaps to identify the true nature and function of Applicant’s goods. Given these numerous scenarios that a consumer may encounter to arrive at the nature of Applicant’s goods, Applicant’s mark is indeed suggestive.

flavor or aroma; (5) offensive slang. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000), available at <http://www.bartleby.com/61/42/F0344200.html>.

The term FRUIT BUNNIES, therefore, is not descriptive of dehydrated fruit snacks; instead, the term creates a unique non-descriptive mark when used to identify dehydrated fruit snacks.

II. Conclusion

Applicant's trademark FRUIT BUNNIES is not merely descriptive of the recited goods. The evidence of record does not compel a conclusion that the mark is merely descriptive for this class of goods, and is instead indicative of the suggestiveness and registrability of Applicant's mark.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing APPLICANT'S REPLY BRIEF has been served on by mailing said copy on February 23, 2007, via First Class Mail, postage prepaid, in an envelope to Commissioner For Trademarks P.O. Box 1451 Alexandria, VA 22313-1451, Attn: DAVID H. STINE- Law Office 114.

/s/ phi lan m. tinsley
Phi Lan M. Tinsley

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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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Mark: FRUIT BUNNIES
Classes: IC 029, US 046
Serial No.: 78/524,961

CERTIFICATE OF MAILING UNDER 37 CFR 1.8

I hereby certify that this correspondence, including all documents referred to below as submitted herewith, are being deposited with the United States Postal Service as first class mail, postage prepaid, in an envelope addressed to: Commissioner For Trademarks P.O. Box 1451 Alexandria, VA 22313-1451, Attn: DAVID H. STINE- Law Office 114 on this 23rd day of February, 2007:



Phi Lan M. Tinsley

Submitted herewith are:

- (1) Applicant's Reply Brief (6 pages)**
- (2) and a Postcard**

All under this Certificate of First Class Mailing dated.